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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-270

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT P. AGUILAR

ON A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent's brief narrows the scope of disagreement regarding the obstruction of justice statute, 18 U.S.C. 1503. Respondent agrees (Resp. Br. 12-13) that, at least as the case comes to this Court, it must be assumed that there was a pending grand jury proceeding and that respondent knew of that proceeding. The dispute therefore concerns only the third element of the offense: whether respondent's conduct constituted an endeavor "corruptly * * * to influence, obstruct, or impede[] the due administration of justice." 18 U.S.C. 1503. Like the court of appeals, respondent does not dispute that his false statements to the FBI agents constituted an endeavor to obstruct the grand jury investigation, in the ordinary sense of those terms. Instead, respondent advances three distinct and

conflicting limitations that he believes should be judicially imposed on Section 1503, in contravention of the plain language of the statute. Each of them, however, would create inexplicable anomalies and lacunae in the coverage of Section 1503; each of them is inconsistent with the course of judicial decisions interpreting the statute; and each of them would eliminate "core" cases of obstruction of justice that have always been thought to be covered by the statute. Each of respondent's alternative interpretations should therefore be rejected.

a. Respondent first argues that a defendant's conduct cannot constitute obstruction of justice unless there is a "direct nexus between the conduct alleged to be criminal and the lawful exercise of the grand jury's authority." Resp. Br. 14-15.

If respondent's "direct nexus" requirement means that the defendant's conduct must have some connection to the proceeding sought to be obstructed, we have no disagreement with that principle. The connection is ordinarily supplied—and was clearly supplied in this case—by the requirements that the defendant "have knowledge or notice or information of the pendency of [the] proceeding[]," see *Pettibone* v. *United States*, 148 U.S. 197, 205 (1893), and that the defendant be shown to have "endeavor[ed] * * * to * * * obstruct" the proceeding. Since a defendant rarely would endeavor to obstruct a proceeding by using some means that has no connection to it (say, a magical incantation), no further inquiry into the "directness" of the "nexus" is required.[1] In this case, respondent chose a means to carry

[1] The cases cited by respondent (Resp. Br. 15 & n.5) for the proposition that "[t]he courts have rebuffed efforts to shoehorn within Section 1503 conduct that does not implicate the exercise by the grand jury of its authority to compel the truthful testimony of witnesses or the production of documents" do not support that proposition. Instead, they make clear that the "connection" between the conduct and the pending proceeding is provided by the requirements that there be a pending proceeding, that the defendant have notice of it, and that he endeavor to obstruct it. Indeed, three of the four cases involved the question whether there was a pending proceeding. See *United States* v. *Brown*, 688 F.2d 596, 598 (9th Cir. 1982) (interference with execution of a search warrant "not aimed at interfering with a pending judicial proceeding" since it took place "wholly outside the context of an ongoing judicial or quasi-judicial proceeding"); *United States* v. *Simmons*, 591 F.2d 206, 208 (3d Cir. 1979) (stating that "the issue here is at what point does an investigation by law enforcement officers cross the threshold to become a pending grand jury investigation for purposes of [Section 1503]," and holding that the line was crossed when the first grand jury subpoenas were issued); *United States* v. *Scoratow*, 137 F. Supp. 620, 621-622 (W.D. Pa. 1956) (conduct must be "in relation to a proceeding pending in the federal courts * * * [a]nd a proceeding is not pending in court at least until a complaint has been filed"). In the other case, *United States* v. *Fayer*, 573 F.2d 741, 745 (2d Cir.), cert. denied, 439 U.S. 831 (1978), the court noted that while advice to a witness not to talk to an FBI agent would merely relate to an investigation by the FBI, advice to a witness "not to testify before the grand jury" could constitute obstruction of justice under the omnibus clause.

out his endeavor (making false statements to investigating agents that he believed would be reported to the grand jury) that was closely connected to the grand jury investigation and that, if successful, would have impeded and obstructed the grand jury's work. Respondent's conduct therefore had the necessary connection to the grand jury investigation to support his conviction.

If respondent intends his "direct nexus" test to require more than that kind of connection to the proceeding sought to be obstructed, however, that test must be rejected. It has no judicial support; contrary to respondent's contention (Resp. Br. 14-15) that "every

single court to construe Section 1503 in this setting has required a direct nexus," no court construing Section 1503 has *ever* used the term "direct nexus" in connection with the statute.[2] Nor does anything in the language of the omnibus clause suggest such a qualification, explain how "directness" should be measured in this context, or clarify how "direct" an endeavor to obstruct must be before it can be found to be a violation.

Respondent addresses those issues by stating that the term "direct nexus" means that the conduct charged under Section 1503 must "implicate the exercise by the grand jury of its authority to compel the truthful testimony of witnesses or the production of documents." Resp. Br. 15. The conduct at issue in this case, however, "implicate[s]" that "authority" in ways that are analogous to—and often much clearer than—the conduct at issue in many other contexts to which Section 1503 applies.

Thus, as we explain in our opening brief, courts have uniformly held that the alteration or forgery of documents that will be presented to a trial or grand jury constitutes obstruction of justice. See U.S. Br. 19 (citing cases). Such conduct is functionally equivalent

[2] Courts have occasionally used the term "nexus" in discussing the scope of Section 1503, although without the qualification "direct." See *United States* v. *Walasek*, 527 F.2d 676, 679 (3d Cir. 1975); *United States* v. *Thomas*, 916 F.2d 647, 652 (11th Cir. 1990). As argued above, we agree that the statute requires a connection, or "nexus," between the defendant's conduct and the grand jury, and such a nexus was shown in this case. Compare *United States* v. *Brand*, 775 F.2d 1460, 1465 (11th Cir. 1985) (statute proscribes conduct that "produces or *which is capable of producing an effect* that prevents justice from being duly administered"); *United States* v. *Wood*, 6 F.3d 692, 700 (10th Cir. 1993) (Tacha, J., dissenting) (same).

to respondent's conduct, since the alteration of documents has exactly the same effect as false statements to a prospective witness: bringing false information before the grand jury and hiding the truth. In addition, courts have found numerous other forms of conduct—all of which are no more "direct" than the conduct at issue here—to fall within the prohibitions of the omnibus clause of the statute. See, *e.g.*, *United States* v. *Mullins*, 22 F.3d 1365, 1367-1368 (6th Cir. 1994) (inducing co-employee to alter records that would be turned over in response to subpoena); *United States* v. *Barfield*, 999 F.2d 1520, 1522, 1524 (11th Cir. 1993) (witness provided false information to attorney for defendant, so that witness's own testimony would be impeached); *United States* v. *Lench*, 806 F.2d 1443, 1444 (9th Cir. 1986) (concealment of documents subject to subpoena); *United States* v. *Davila*, 704 F.2d 749, 752 (5th Cir. 1983) (defendants forged exculpatory documents and gave them to their attorney, knowing they would be turned over to government during their trial); *Knight* v. *United States*, 310 F.2d 305, 307 (5th Cir. 1962) (defendant planted illegal bottle of liquor on premises of witness against him).

The line that respondent proposes fails to distinguish this case from many instances in which the omnibus clause is clearly applicable, and it would inject substantial uncertainty into what have been routine Section 1503 prosecutions. Moreover, the omnibus clause "was drafted with an eye to 'the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined.'" *United States* v. *Griffin*, 589 F.2d 200, 206-207 (5th Cir.) (quoting *Anderson* v. *United States*, 215 F.2d 84, 88 (6th Cir.), cert. denied, 348 U.S. 888 (1954)), cert. denied, 444 U.S. 825 (1979). See also S. Rep. No. 532, 97th Cong., 2d Sess.

18 (1982). To impose an artificial and ill-defined limit on the scope of the omnibus clause would be at odds with that purpose.

b. Respondent next proposes that the principle of *ejusdem generis* should be applied in this case to limit the scope of the omnibus clause to offenses that do not involve witnesses. Resp. Br. 19-20. Respondent's argument is wrong because the principle of *ejusdem generis* (and its close relative, the maxim of *noscitur a sociis*) has no application to the omnibus clause and, even if it did, the statute would still cover respondent's case.

The courts of appeals that have addressed the issue have overwhelmingly refused to apply the *ejusdem generis* maxim to the omnibus clause of Section 1503.[3]

[3] Indeed, it appears that the court below (see Pet. App. 23a & n.9) is the *only* court to apply the *ejusdem generis* maxim to the omnibus clause of Section 1503. The Eleventh, Fifth, Third, and Second Circuits have flatly refused to do so. See, *e.g.*, *United States* v. *London*, 714 F.2d 1558, 1566-1567 (11th Cir. 1983); *United States* v. *Howard*, 569 F.2d 1331, 1333 (5th Cir.), cert. denied, 439 U.S. 834 (1978); *United States* v. *Walasek*, 527 F.2d at 679; *United States* v. *Cohn*, 452 F.2d 881, 883-884 (2d Cir. 1971) (citing *United States* v. *Alo*, 439 F.2d 751, 753-754 (2d Cir.) (18 U.S.C. 1505), cert. denied, 404 U.S. 850 (1971)), cert. denied, 405 U.S. 975 (1972). The Fourth Circuit appears to have taken a similar position. See *United States* v. *Kenny*, 973 F.2d 339, 343 (4th Cir. 1992). Although the Sixth Circuit at one time appeared to apply the *ejusdem generis* principle to the omnibus clause of Section 1503, see *United States* v. *Essex*, 407 F.2d 214, 218 (6th Cir. 1969), it has repeatedly distinguished the case in which it did so and has since declined to apply the rule in other contexts. See *United States* v. *Jeter*, 775 F.2d 670, 676-677 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986); *United States* v. *Faudman*, 640 F.2d 20, 22-23 (6th Cir. 1981). Before this case, the Ninth Circuit itself had also refused to apply *ejusdem generis* to the omnibus clause. See, *e.g.*, *United States* v. *Lester*, 749 F.2d 1288, 1293 n.3 (9th Cir. 1984); *United States* v. *Rasheed*, 663 F.2d 843, 851-852 (9th Cir. 1981), cert. denied, 454 U.S. 1157 (1982).

The prerequisites for application of that maxim are not present here. Under its standard formulation, *ejusdem generis* stands for the principle that "where general words follow an enumeration of specific items, the general words are read as applying only to other items akin to those specifically enumerated." *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588 (1980). The principle can be useful where a statute contains a list of words, usually followed by a general or collective term, to which a particular statutory command is applicable. This Court's cases have applied the principle exclusively in that context.[4] Indeed, even the recent cases in which the *ejusdem generis* principle has been *un*successfully

[4] A few examples follow, in each of which the term to which the principle was to be applied is italicized: *Hughey* v. *United States*, 495 U.S. 411, 417, 419 (1990) ("the amount of the loss sustained by any victim * * *, the financial resources of the defendant, the financial needs and earning ability of the defendant * * *, and *such other factors as the court deems appropriate*"); *Breininger* v. *Sheet Metal Workers*, 493 U.S. 67, 90, 91-92 (1989) ("fin[e], suspen[d], expe[l], or *otherwise disciplin[e]*"); *Garcia* v. *United States*, 469 U.S. 70, 72, 74 (1984) ("*mail matter* or * * * money or other property"); *Third National Bank in Nashville* v. *Impac Limited, Inc.*, 432 U.S. 312, 313 n.1, 322-323 (1977) ("attachment, *injunction*, or execution"). The maxim of *noscitur a sociis* has been applied only in the same context, as the following cases make clear (the terms to which the doctrine was applied are in italics): *Gustafson* v. *Alloyd Co.*, No. 93-404 (Feb. 28, 1995), slip op. 11, 12-13 ("prospectus, notice, circular, advertisement, letter, or *communication*"); *Dole* v. *United Steelworkers*, 494 U.S. 26, 34, 36 (1990) ("a written report form, application form, schedule, questionnaire, *reporting or recordkeeping requirement*, collection of information requirement, or other similar method calling for the collection of information"); *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 305, 307 (1961) ("exploration, *discovery*, or prospecting").

urged on the Court involve the interpretation of a general term found in a list of specific terms in a statute.[5]

By contrast, the three separate clauses of Section 1503 do not constitute an "enumeration of specific items," and the omnibus clause of Section 1503 is not one term among others to which a general statutory command applies. Instead, it is one of three distinct prohibitions in Section 1503. The first prohibits "influenc[ing], intimidat[ing], or imped[ing]" jurors or court officers "in

[5] The cases in which the Court has declined to apply the principle include the following, in which the italicized phrase indicates the terms assertedly governed by the *ejusdem generis* principle: *Holder* v. *Hall*, 114 S. Ct. 2581, 2591, 2604 (1994) (Thomas, J., concurring in the judgment) ("voting qualification or prerequisite to voting or *standard, practice, or procedure*"); *PUD No. 1 of Jefferson County* v. *Washington Department of Ecology*, 114 S. Ct. 1900, 1916, 1917 (1994) (Thomas, J., dissenting) (conditions may be imposed to ensure compliance with "applicable effluent limitations and other limitations, * * * prohibition[s], effluent standard[s], or pretreatment standard[s] * * * [or] *any other appropriate requirement of State law*"); *Norfolk & Western Ry.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 127, 129 (1991) ("the antitrust laws and * * * *all other law*"); *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 39, 44 n.5 (1983) ("coal and *other minerals*"); *Director, OWCP* v. *Perini North River Associates*, 459 U.S. 297, 327 (1983) (Stevens, J., dissenting) ("*any person engaged in maritime employment*, including any longshoreman * * * and any harborworker"); *United States* v. *Turkette*, 452 U.S. 576, 578 n.2, 581 (1981) ("any individual, partnership, corporation, association, or other legal entity, and *any union or group of individuals associated in fact although not a legal entity*"); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. at 580 n.1, 587-589 ("Administrator's action in approving or promulgating any implementation plan [under specified provisions of the statute in issue] or his action under [another statutory provision] or under regulations thereunder, or *any other final action of the Administrator*").

the discharge of [their] duty," while the second prohibits "injur[ing]" jurors for their jury service or court officers for the "performance of [their] official duties." 18 U.S.C. 1503. Except for the term "Whoever" with which the statute begins and the penalty provision with which it ends, the omnibus clause stands entirely on its own. All three prohibitions in Section 1503 are directed at obstruction of justice. But, aside from the fact that they are aimed at that result, they have little else in common. There is no basis for artificially limiting the omnibus clause to the scope of the earlier prohibitions, and this Court has never applied the *ejusdem generis* principle in a similar context.

In any event, the *ejusdem generis* principle has no application "when the whole context dictates a different conclusion," *Norfolk & Western Ry.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991), and "it may not be used to defeat the obvious purpose of legislation," *Gooch* v. *United States*, 297 U.S. 124, 128 (1936). As noted above, the purpose of the omnibus clause of Section 1503 is to prohibit obstruction of justice, by whatever means employed. To impose artificial limits on the scope of the omnibus clause, unrelated to the meaning of the terms of that clause, would defeat that purpose. We have cited examples above that establish the broad scope of Section 1503. See also U.S. Br. 28-29 (omnibus clause still applies to witness-related offenses). But respondent's own examples and suggested limitations make the same point.

Thus, respondent argues (Resp. Br. 20) that the omnibus clause of Section 1503 should not be applied to witness-related offenses, but only to offenses involving the individuals mentioned in the earlier clauses of Section 1503—jurors and court officers. We explain at some length in our opening brief that any such limitation

has no basis in the legislative history of the enactment or amendment of 18 U.S.C. 1512, which provides both narrower and broader protection to witnesses than does the omnibus clause of Section 1503.[6] See U.S. Br. 22-35. Nor does any such limitation have any basis in the terms of the omnibus clause, which plainly extend beyond the specific offenses mentioned earlier in Section 1503 and which provide no basis whatever for distinguishing between witness-related and non-witness-related endeavors to obstruct justice.[7] Indeed, even respondent's

[6] Respondent argues that the omnibus clause, if interpreted in accordance with its plain language, will "absorb[] the whole statutory scheme" of obstruction offenses. Resp. Br. 22. That contention is wrong, for three reasons. First, most of the other obstruction offenses involve different elements of proof and will inevitably cover offenses not covered by Section 1503. For example, 18 U.S.C. 1512 does not require proof that a proceeding was pending and does not require proof that the anticipated proceeding was federal, rather than state; Section 1503 requires proof of both of those facts. Second, none of the other obstruction offenses includes an omnibus clause. As we explain in our opening brief with respect to Section 1512, see U.S. Br. 31, omnibus clauses were not necessary in those statutes precisely because the omnibus clause in Section 1503 was sufficient to fill in any gaps in the statutory scheme. Third, it is a natural feature of a "gap-filling" criminal statute that it will overlap with more specific criminal prohibitions, and respondent does not explain how that result could be avoided.

[7] Respondent asserts that our position "implies" that the term "corruptly" is mere "surplusage." Resp. Br. 23 n.14. That is not correct. For example, truthful testimony before a grand jury could certainly be described as an effort to "influence" the grand jury, but it would not be an effort to exert "corrupt[] influence." Respondent also—hesitantly—states that the omnibus clause "may be unconstitutionally vague," Resp. Br. 22 n.13, and cites *United States* v. *Poindexter*, 951 F.2d 369, 377-379 (D.C. Cir. 1991), cert. denied, 113 S. Ct. 656 (1992), in support of that statement. No court has ever held that the omnibus clause of Section 1503 is unconstitutionally vague. Although the *Poindexter* court reached that conclusion (mistakenly, in our view) with respect to the omnibus clause of 18 U.S.C. 1505, that court expressly distinguished Section 1503 in that regard. See 951 F.2d at 385.

own example makes the same point.[8]

The broader point is that "the most natural construction of the [omnibus] clause is that it prohibits acts that are *similar in result, rather than manner*, to the conduct described in the first part of the statute." *United States* v. *Howard*, 569 F.2d 1331, 1333 (5th Cir.), cert. denied, 439 U.S. 834 (1978) (emphasis added). There is no reason to shield respondent's conduct, which undoubtedly falls within the plain language of the omnibus clause, merely because it does not also fall within the terms of the other prohibitions in Section 1503.

c. Respondent finally proposes (Resp. Br. 22) that, "even if in some circumstances Section 1503 might reach

[8] Respondent cites (Resp. Br. 21 n.10) *United States* v. *London*, 714 F.2d at 1566-1567, as a case that is "similar in kind" to those covered by the first two clauses in Section 1503. In *London*, an attorney was prosecuted under the omnibus clause of Section 1503 for altering a judgment, which in fact ran in favor of his clients, to make it appear that it was entered against them. The attorney then collected the purported "judgment" from the clients. 714 F.2d at 1560. The attorney's conduct was not directed toward witnesses. But neither did it involve the other individuals specifically mentioned in the first two clauses in Section 1503—jurors or court officers. Indeed, the conduct in *London* was less related to jurors than was respondent's conduct; respondent's conduct was designed to affect grand jurors, in the sense of interfering with their investigation of the facts. In short, if the omnibus clause was correctly applied in *London*, as respondent argues, see Resp. Br. 21 n.10, it follows *a fortiori* that it applies to his own conduct.

out to cover a prospective witness, a mere false statement is not one of those circumstances." He reasons that "[i]n addition to punishing one who 'corruptly * * * endeavors to influence, obstruct, or impede,' the statute prohibits the use of 'threats,' 'force,' 'threatening letter[s] or communication[s],' 'intimida[tion],' and 'injur[y]' to 'person or property.'" Resp. Br. 23. According to respondent, "[a]ll of the prohibited activities [in Section 1503] involve varying degrees of forceful persuasion," while "[a] simple false statement does not." Resp. Br. 24.

Respondent's argument is mistaken. Initially, it is not true that, aside from the omnibus clause, "all" of the prohibited activities in the earlier portions of Section 1503 "involve varying degrees of forceful persuasion." For example, bribing a juror to return a favorable verdict or bribing a judge to give a favorable sentence could not be characterized as "forceful persuasion". Nor could falsely informing a juror that a trial was not being held on a given date, in order perhaps to provoke a mistrial. Yet those forms of conduct would fall squarely within the language of the earlier portions of Section 1503. Moreover, many of the forms of conduct that have always been thought to be prohibited by the omnibus clause, such as alteration or forgery of documents for presentation to a grand jury, see pp. 4-5, *supra*, or disclosure of grand jury information protected by Fed. R. Crim. P. 6(e), see *United States* v. *Jeter*, 775 F.2d 670, 676-677 (6th Cir. 1985), cert. denied, 475 U.S. 1142 (1986), have nothing to do with "forceful persuasion" or, indeed, with any other form of persuasion. The omnibus clause of Section 1503 should not be limited to instances of "forceful persuasion."

2. With respect to the wiretap disclosure statute, 18 U.S.C. 2232(c), respondent concedes that there is no

dispute concerning the knowledge or intent elements of the offense. Resp. Br. 38-39. It must be assumed, for purposes of this Court's decision, that respondent knew of the April 1987 application to wiretap Tham's phones, as to which Chapman was a named interceptee. See Gov't Exh. 18B, at 2. It also must be assumed that respondent disclosed that application "in order to obstruct, impede, or prevent" the interception. 18 U.S.C. 2232(c). The only dispute now concerns the interpretation of the word "possible" in the statutory requirement that the defendant be shown to have "give[n] notice * * * of the possible interception." *Ibid.*

a. As we explain in our opening brief (U.S. Br. 46-47), the term "possible" in Section 2232(c) brings within the statute a person who has knowledge of a wiretap or application—but who does not know whether or when that application was granted or if interceptions will actually occur—if he discloses to any person information about the wiretap in order to obstruct interceptions. Once the defendant learns of the application or authorization, the statute prohibits him from disclosing the "possible" interception that, based on the defendant's knowledge, might result. Read in context, the term "possible" refers to what it is that the defendant has to disclose: the information that he has learned about the possibility, not the certainty, of interceptions.

Respondent argues that the term "possible" was included in the statute not to broaden its coverage, but to restrict it. Respondent asserts that by virtue of the term "possible," "[o]nce a wiretap has expired, or an application for authorization has been denied, Section 2232(c) no longer prohibits its disclosure." Resp. Br. 36. The only purpose of such a limitation would be to protect an individual who intends to obstruct a wiretap by giving notice of it even though, unbeknownst to him, it was

denied or is no longer in operation. As we explain in our opening brief (U.S. Br. 41), that interpretation flies in the face of Congress's intent, which was to proscribe the "conduct of giving notice of the possible interception to any person who *was or is* the target of the interception." S. Rep. No. 541, 99th Cong., 2d Sess. 34 (1986) (emphasis added). It is also inconsistent with Congress's decision to extend Section 2232(c) to attempts to give notice, thereby prohibiting even the effort to achieve the forbidden end.

Respondent's interpretation is also untenable because it would create a series of anomalous, windfall defenses to a Section 2232(c) prosecution. There are numerous reasons why interception of a target's conversations might not be "possible," in the sense that, no matter how hard the defendant tried to obstruct the interception, the defendant could not possibly succeed. Those include the expiration of a wiretap or denial of an application. But they also include the defendant's having moved to a new address, a mechanical malfunction, or the like. See U.S. Br. 47. Such defenses, like that urged by respondent, could be framed in terms of the "impossibility" of an interception occurring. Yet none of them would be plausible, for the same reason that respondent's defense is not plausible. If, in light of the defendant's knowledge, an interception is "possible" because he has learned of a wiretap or an application, the defendant cannot gain immunity by showing that the interception was "impossible" for some reason entirely unknown to him.

Respondent tries to escape the consequences of his argument by briefly referring to the doctrine of legal impossibility, claiming that "it is apparent on the face of the statute that Congress was concerned with legal possibility, not factual possibility." Resp. Br. 44 n.33. The face of the statute, however, simply uses the term

"possible," and there is no basis for distinguishing a mechanical breakdown, say, from an expiration of an ongoing wiretap. As we have argued above, Congress's intent in using the term "possible" was not to provide defendants with windfall defenses based on facts that they were unaware of, but to make clear that by disclosing their knowledge of the possibility of interceptions they have committed a crime, whether or not interceptions actually occur. Moreover, insofar as respondent is referring to the doctrine of "legal impossibility," that doctrine provides only that "[i]f * * * what the defendant set out to do is not criminal, then the defendant is not guilty of attempt." 2 Wayne LaFave & Austin Scott, Jr., *Substantive Criminal Law* § 6.3(a) at 40 (1986); see generally *id.* § 6.3(a)(3) at 44-49. In this case, what respondent set out to do—interfere with the interception of which he had knowledge—*was* criminal. Accordingly, the doctrine of legal impossibility would not provide him with a defense.[9]

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[9] Legal impossibility, as a defense to criminal charges distinct from the defense that the defendant's conduct simply did not violate the statute, has been "criticized by many commentators and rejected in the Model Penal Code and in virtually all of the recent recodifications." 2 LaFave & Scott, *supra*, § 6.3(a)(3) at 46 (footnotes omitted). The Model Penal Code, for example, provides that a defendant is guilty of attempt if he "purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be." § 5.01(1)(a). The drafters of the Code note that "[t]he impossibility defense is rejected, liability being focused upon the circumstances as the actor believes them to be rather than as they actually exist." 1 *Model Penal Code & Commentaries* § 5.01, at 297 (1985); see also *id.* at 307-317. It is clear in this case that respondent believed the "circumstances" to be that the wiretap of which he had knowledge was still in operation at the time of his disclosure. As he said three

b. Respondent argues (Resp. Br. 44-47) that the First Amendment requires the government to demonstrate a compelling interest before it may prohibit the disclosure of wiretap information. Demonstrating such an interest, in respondent's view, requires engrafting a "pending application or actual wiretap" requirement onto the statute.

Respondent is correct that the government may not generally restrict individuals from disclosing information that lawfully comes into their hands, absent a "state interest of the highest order." *Smith* v. *Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979). The statute does not, however, generally impose such a restriction, since it applies only to those who disclose wiretap information "in order to obstruct, impede, or prevent" the interception. See U.S. Br. 47-48. Equally important, respondent was not simply a member of the general public who happened lawfully to come into possession of information about a wiretap. Instead, he was a federal district court judge, who learned of confidential wiretap information in the course of his official duties and disclosed it in an attempt to obstruct the wiretap.[10]

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months later, "[o]h yeah the phone's definitely tapped. * * * Absolutely." J.A. 21.

[10] Respondent does not dispute that Judge Peckham disclosed the information about the wiretap application to respondent as a confidential matter, in order to preserve the court's integrity. See U.S. Br. 4. Respondent himself admitted both to Solomon and to his nephew that Judge Peckham was the source of his knowledge. See U.S. Br. 37-38. Thus, although respondent's recollection may have been jolted by his observation of an FBI surveillance vehicle, see Resp. Br. 45 n.34, there was no doubt that his knowledge arose from Judge Peckham's disclosure. In those circumstances, the fact that respondent's recollection may have been refreshed by his observation of the FBI vehicle did not create any First Amend-

Government officials and others in sensitive and confidential positions have special duties of non-disclosure. See Fed. R. Crim. P. 6(e) (prohibiting disclosure of grand jury information); *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 31 (1984) (protective orders in civil discovery do not violate First Amendment). Since such duties are assumed voluntarily, the government need not justify them on the basis of the same stringent standards that would apply to efforts to impose such duties on unwilling members of the public. For example, no such stringent standard was imposed in *Snepp* v. *United States*, 444 U.S. 507, 511 & n.6 (1980) (per curiam), before the Court concluded that the government could enforce its right to prepublication review of a former CIA agent's book.[11]

In any event, the government's interest in protecting the secrecy of wiretap information is substantial. Under 18 U.S.C. 2518(5), no wiretap authorization or extension may last more than 30 days, and the government is under a duty to limit the length of wiretaps to what is necessary. See also 18 U.S.C. 2518(3) (showings government must make to obtain wiretap or wiretap extension).[12] Thus, wiretaps are commonly authorized,

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ment issue for the jury, and the trial court properly refused respondent's instruction on the issue. J.A. 127.

[11] *Snepp* is particularly instructive, because the government in that case conceded that the agent's book did not contain any classified information. 444 U.S. at 510. Under respondent's standard, that fact would have certainly foredoomed any effort by the government to show a compelling interest in having the book submitted for prepublication review.

[12] Indeed, although 18 U.S.C. 2518(8)(d) provides that inventories of intercepted conversations must be served on the named interceptees within 90 days of termination of the wiretap order, that statute provides that upon an *ex parte* showing of good cause, the court may extend that date. In this case, the

extended, and reauthorized as needed from time to time in the course of a criminal investigation. See U.S. Br. 43 n.10. Consequently, the government has a powerful interest in precluding disclosure of wiretaps for at least as long as it remains a possibility that they will be in force or that an extension or reauthorization will be sought or ordered. In this case, that period certainly extended through the time that petitioner disclosed the wiretap.[13]

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government sought and obtained such extensions for the Tham wiretap until May 1989, based upon the need to ensure the integrity and confidentiality of the wiretap and the investigation. See Gov't Exh. 20(a)-20(n).

[13] Respondent acknowledges that there were subsequent wiretaps on Tham's phone until after respondent made his disclosure. But he asserts that "there is no evidence in the record that Chapman was named as an interceptee of these subsequent wiretaps." Resp. Br. 5. That statement is mistaken. All of the wiretap orders were in evidence at respondent's first trial (and thus in the record in this case), and showed that Chapman was a named interceptee in all but one of those orders. Since the scope of the wiretaps was not an issue on which the jury had to reach a decision, it was determined that the later wiretap orders did not have to be introduced in evidence at the second trial. But the jury was given evidence that, by August 1987, the FBI had prepared "a Title III [*i.e.*, wiretap] affidavit for 5 telephone lines utilized by * * * Tham, which alleges * * * violations involving Tham's association with Abe Chapman," and that the FBI "intend[ed] to further monitor Chapman's activities in order to determine the full extent of his relationship with Judge Aguilar." Gov't Exh. 25 (Def's Exh. 5), at 5-6. Moreover, all of the wiretap orders were provided to defense counsel before the intercepted conversations were introduced in evidence, as required by 18 U.S.C. 2518(9). Defense counsel have not before challenged—and apparently do not now challenge—that Chapman was in fact a named interceptee.

c. In a similar vein, respondent's amicus argues that, because in its view our interpretation impermissibly "extends the statute's proscription beyond those instances in which the person disclosing had * * * a duty to keep the disclosed information confidential," Nat'l Ass'n of Criminal Defense Lawyers Br. 5, respondent should be permitted to mount an overbreadth challenge to the statute to protect individuals who come upon wiretap information innocently and legally, but who disclose it in order to obstruct the possible interception. See also Resp. Br. 45 n.34.

Respondent himself cannot raise a First Amendment claim based on the application of the statute to individuals who have no "duty to keep the disclosed information confidential." Nor is respondent assisted by the overbreadth doctrine. Under settled law, "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only 'real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *Osborne* v. *Ohio*, 495 U.S. 103, 112 (1990) (quoting *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973)). A person may be prosecuted under Section 2232(c) only if he has obtained the highly confidential information that a wiretap has been applied for or authorized and intends to obstruct it, *i.e.*, does not know that it is not in operation. The premise of the statute is that, in light of the great care with which information on wiretaps in active investigations is safeguarded, most people in a position to violate the statute will be government officials and employees, such as judges, lawyers for the Department of Justice, and FBI agents, who have a special obligation to keep the information confidential. Even if application of the statute to individuals who have no special duty of confidentiality

would raise First Amendment concerns, there is no reason to believe that those instances would be "substantial * * * in relation to the statute's plainly legitimate sweep."

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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